(15)

No. 94-1837

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF PETITIONER

JOHN J. GILL III
Counsel of Record

MICHAEL F. CROTTY
MATHEW H. STREET

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026
Attorneys for Amici Curiae

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*Complete list of sponsoring organizations and counsel appear on inside cover.

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JAMES T. MCINTYRE
THE MCNAIR LAW FIRM
1155 15th Street, N.W.
Washington, D.C. 20005
(202) 659-3900
Attorney for Association of Banks in Insurance

RICHARD M. WHITING
THE BANKERS ROUNDTABLE
805 15th Street, N.W.
Washington, D.C. 20005
(202) 289-4322

LEONARD J. RUBIN
BRACEWELL & PATTERSON
2000 K Street, N.W.
Washington, D.C. 20006
(202) 828-5800
Attorney for Independent Bankers Association of America

GERALD M. NOONAN
CONNECTICUT BANKERS ASSOCIATION
450 Church Street
Hartford, CT 06103
(203) 527-5161

THOMAS H. RISTINE
ICE MILLER DONADIO & RYAN
One American Square
Indianapolis, IN 46282
(317) 236-2100
Attorney For Indiana Bankers Association

M. THURMAN SENN
MORGAN & POTTINGER
601 W. Main
Louisville, KY 40202
(502) 589-2780
Attorney for Kentucky Bankers Association, Owensboro National Bank, First National Bank of Louisa, and Citizens National Bank of Paintsville

MARY E. ARCENEAUX
LOUISIANA BANKERS ASSOCIATION
P.O. Box 2871
Baton Rouge, LA 70802
(504) 387-3282

MCKINLEY W. DEAVER
B. CLINT GARDNER
MISSISSIPPI BANKERS ASSOCIATION
P.O. Box 37
Jackson, MS 39205
(601) 948-6366

DAVID L. GLASS
NEW YORK STATE BANKERS ASSOCIATION
485 Lexington Avenue
New York NY 10017
(212) 949-1184

QUESTIONS PRESENTED

1. Whether a federal statute that gives a national bank operating in a town with a population not exceeding five thousand the right to sell insurance (12 U.S.C. § 92) preempts a state law that prohibits such a bank from selling insurance.

2. Whether a state law prohibiting banks from selling insurance is a law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

3. Whether 12 U.S.C. Section 92 is an "Act [that] specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

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BRIEF OF THE AMICI CURIAE
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IN SUPPORT OF PETITIONER

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.3 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association, Association of Banks in Insurance, The Bankers Roundtable, and the Independent Bankers Association of America are national trade associations of the commercial banking industry that, collectively, represent very nearly every banking institution in the country. All of the associations frequently appear in litigation on matters of concern to their respective members. The question of the extent to which banks may participate in an entire line of business specifically made available to them by statute self-evidently fits within the interests of the associations.

The Connecticut, Indiana, Kentucky, Louisiana, Mississippi and New York State Bankers Associations are trade associations for the commercial banking industry within their respective states. Each of them has appeared as amicus curiae or as a party in litigation over the insurance or annuity sales powers of commercial banks, either in this Court or in federal or state courts in their respective jurisdictions.

The Owensboro National Bank, First National Bank of Louisa, and Citizens National Bank of Paintsville are national banks located and doing business in small towns in Kentucky. Together with the Kentucky Bankers Association, they are and have been parties to litigation against the Commissioner of the Department of Insurance of Kentucky. That litigation resulted in a decision upholding the preemptive effect of federal law over Kentucky's version of state anti-affiliation statutes. *Owensboro National Bank v.*

Stephens, 44 F.3d 388 (6th Cir. 1994). That decision, in turn, resulted in a Petition for Writ of Certiorari filed by the Commissioner, *Stephens v. Owensboro National Bank*, 64 U.S.L.W. 3069 (U.S. July 13, 1995)(No. 95-74). This Court has not acted on that Petition, making it apparent that the ultimate outcome of the Kentucky litigation will be determined in large measure by the outcome of this case.[1]

In addition to the three cases before this Court, there are at least three other cases[2] now pending before or recently decided by courts around the country that explore the extent of the powers, if any, of state insurance commissioners to limit the exercise of lawful authority of

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[1] Amicus Louisiana Bankers Association is similarly situated. The Association, along with the American Bankers Association and the Association of Banks in Insurance, was an amicus curiae in *First Advantage Insurance v. Green*, 652 So. 2d 562 (La. Ct. App. 1995), *application for writ of certiorari or review denied*, No. 95-C-0820 (La., May 5, 1995), *petition for cert. filed*, 64 U.S.L.W. 3017 (U.S. June 27, 1995) (No. 94-2130). The Court likewise seems to be holding this Petition until a decision on the merits of *Barnett*, thereby making this brief the only realistic opportunity for the Louisiana Bankers Association to state its position on the issues affecting the litigation of most immediate concern to it.

[2] The others include *NBD Bank, N.A. v. Bennett*, ___ F.3d ___ (No. 95-1310 (7th Cir., Oct. 4, 1995)); *Shawmut Bank Connecticut, N.A. v. Googins*, No. 3:94 CV 146 (RNC) (D. Conn.); and *Deposit Guaranty National Bank v. Dale*, No. 95 CV 640 WS (S.D. Miss.).

national banks. Amici are interested in the outcome of those cases as well, and recognize that the decision of this Court in the present case could well be dispositive of that "next generation" of cases as well.

Ostensibly relying on "states' rights" and "consumer protection" as the stated justification for their position, insurance commissioners in alliance with their constituent insurance agent trade associations seek to deprive federal instrumentalities[3] of powers and authorities granted to them by explicit federal law, to deprive insurance *companies* (as distinguished from insurance *agents*) of potential business opportunities to secure for themselves a more effective and efficient distribution system for their products, and to deprive the American consumer of the benefits of increased competition for their insurance business.

Your amici, on behalf of themselves and their members, maintain that states have ample rights to regulate business entities within their own jurisdictions on matters not

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[3] "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created." *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896).

covered already by federal law, and that national banks are subject to sufficient business and consumer regulation by virtue of comprehensive federal law[4] and implementing rules adopted by the federal agencies chartered by the United States Congress for the very purpose of overseeing *all* the activities of national banks.

No valid public policy interests would be served by permitting state insurance commissioners to superimpose yet another, often Draconian, layer of "regulation" upon national banks, especially where to do so would manifestly defeat the Congressional purpose in enacting the federal law granting national banks located and doing business in small towns the power to act as agents in the sale of insurance. As we discuss in detail below, there is likewise no *legal* reason to conclude that plenary authority to regulate insurance agency activities of national banks is reserved for the states in derogation of long-standing federal law.

SUMMARY OF THE ARGUMENT

This case ultimately revolves around the proper and reasonable interpretation of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The McCarran-Ferguson Act provides that federal law does not invalidate, impair or supersede a

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[4] *See, for example*, 12 U.S.C. § 1972. That statute makes it unlawful for a bank to condition the extension of credit upon a customer's purchase of an insurance product from the bank or one of its affiliates--the alleged fear of which is said to have prompted the enactment of state anti-affiliation statutes as discussed below.

state law enacted for the purpose of regulating the business of insurance unless the federal law in question specifically relates to the business of insurance.

The applicable federal law, 12 U.S.C. § 92,[5] self-evidently "relates" to the business of insurance--and does so "specifically"--if the business of an insurance *agent* is deemed to be within the scope of the McCarran-Ferguson Act's term "business of insurance." Using the word "insurance" five times, as it does, Section 92 unambiguously grants to national banks located and doing business in places with a population that does not exceed 5,000 the authority to act as agent in the sale of insurance. Nothing more could be, or is, required for Section 92's terms to fit precisely within the plain meaning of the McCarran-Ferguson Act's "specifically relates" language. That being the case, Section 92 preempts contrary state law--even a state law that regulates the business of insurance--under the terms of the McCarran-Ferguson Act itself. The plain meaning of the statute, after all, is what governs the outcome of this litigation. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-375 (1986).

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[5] In 1916, Congress added an unnumbered paragraph, as an amendment, to Section 13 of the Federal Reserve Act of 1913. The strange history of this paragraph is described at length in this Court's opinion in *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 113 S. Ct. 2173 (1993). The paragraph has come to be popularly known as "Section 92" and this brief will, for convenience, refer to it as such.

In this case, the relevant state law is not one enacted for the purpose of regulating the business of insurance, and consequently the McCarran-Ferguson Act does not apply by its own terms. Like all similar state anti-affiliation statutes, Florida's contribution to the discussion was enacted under the political importunings of insurance agent lobbyists as an anti-competitive act of self preservation having nothing to do with the actual "regulation" of anything. Notwithstanding the real purpose for enacting the state statute, to the extent that it *in fact* "regulates" anything, it is the *banking* business that is subject to the strictures of the law, not any entity that is engaged in the business of insurance. In addition, it is only the effort of national banks to act as insurance *agents* that is allegedly barred by the relevant state law, whereas the McCarran-Ferguson Act pertains only to the business of insurance. The business of insurance and the business of insurance agency are different things in law and in fact.

Assuming that Section 92 preempts contrary state law in this case, the extent of that preemption should be determined as well, and determined in such a fashion as to make clear that the states may not impose upon national banks any discriminatory treatment with respect to their licensing as insurance agents.

ARGUMENT

I. SECTION 92 SPECIFICALLY RELATES TO INSURANCE

Section 92 of Title 12, U.S.C., provides that

> [i]n addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other *insurance* company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling *insurance* and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the *insurance* company for which it may act as agent: *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on *insurance* policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for *insurance*.

Notwithstanding the repeated use of the word "insurance" in the actual text of the statute, the Eleventh Circuit below "conclude[d] 'that section 92 neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires,'...that apparently conflicting state laws be preempted." *Barnett Bank of Marion County, N.A., v. Gallagher*, 43 F.3d 631, 637 (11th Cir. 1995)(citation omitted). The Eleventh Circuit further

concluded that when Congress enacted Section 92, in 1916, it "could not have been attempting to *regulate* a business that it believed it had no power to *regulate*. Congress was concerned with banking, not insurance." *Id.*

The court's decision is entirely devoid of any *analysis* that supports its conclusion concerning the phrase "specifically relates to the business of insurance," which is the only term that actually appears in the relevant text of the McCarran-Ferguson Act. The court's analysis was limited to a determination of whether Section 92 somehow specifically "required" preemption of state law and a determination whether Section 92 "regulated" insurance. Those were irrelevant and inappropriate considerations, since "required" and "regulate" are words that do not appear in the actual text of the relevant part of the statute. Nor are the words "regulates" or "requires" synonymous with each other or with the actual word in the statute, "relates."

Rather than attempting to interpret and apply the word "relates" (other than in its summary conclusion) the court below instead erroneously attempted to apply a phrase from this Court's decision in *United States Department of the Treasury v. Fabe*, 113 S. Ct. 2202 (1993) in order to determine the outcome of this case. In *Fabe*, a case having nothing to do with the issues now before the Court,[6] the

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[6] With respect to the "specifically relates" prong of the McCarran-Ferguson test, the *Fabe* opinion is dictum. The parties in that case themselves agreed that the federal statute in question did *not* specifically relate to the business of insurance. *Id.* at 2208. It is a weak reed upon which to

majority wrote that:

> state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically *requires* otherwise.

Id. at 2211 (emphasis added).

That the *Fabe* decision does not address the proper interpretation and application of the "specifically relates" prong of the McCarran-Ferguson test is demonstrated graphically by a subsequent decision of this Court in a case where the second prong of McCarran-Ferguson actually *was* in issue. In *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517 (1993), without even *mentioning* the six-month old *Fabe* decision, this Court held that a federal statute, the Employee Retirement Income Security Act, preempted contrary state "insurance" laws.

ERISA did not "regulate" the business of insurance[7]

hang such an important decision, for as this Court has cautioned, there is a "need to distinguish an opinion's holding from its dicta." *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 113 S. Ct. 2173, 2186 n. 11 (1993).

[7] In fact, no federal statute "regulates" the business of insurance since the McCarran-Ferguson Act decreed, as a matter of federal policy, that "regulation" of the business of insurance would be left to the states. Consequently, if the

in the sense that the Eleventh Circuit uses the term. Rather, it concerned pensions and taxation. Nothing in ERISA "specifically required" the preemption of state laws as the Eleventh Circuit uses the term. Indeed, the statute is internally contradictory on that very point: On the one hand, 29 U.S.C. section 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." On the other hand, 29 U.S.C. section 1144(b)(2)(A) provides that ERISA shall not "be construed to exempt or relieve any person from any law of any State which regulates insurance...."

Nevertheless, ERISA was given preemptive effect over contrary state laws because it *did* do all that the McCarran-Ferguson Act required it to do in order to achieve that status:

> ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and specifically relates to the business of insurance. (citation omitted). Thus, the McCarran-Ferguson Act does not surrender regulation exclusively to the States so as to preclude the application of ERISA to an insurer's actions under a general account contract.

Eleventh Circuit is right in holding that a federal statute must "regulate" the business of insurance in order to "specifically relate" to the business of insurance, then the second prong of the McCarran-Ferguson test becomes entirely meaningless: no federal law would ever preempt a state insurance law short of an outright repeal of the McCarran-Ferguson Act.

Id. at 525.

The only apparent basis for the Court to have held that ERISA "obviously and specifically relates to the business of insurance" is the fact that in the actual text of ERISA there are references *to* insurance and insurance products. That is true of Section 92 as well,[8] and for this Court to so hold again here would be entirely consistent with its own recent precedents construing variants of the word "relates." In *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), for example, the Court held that:

> [t]he ordinary meaning of ["relating to"] is a broad one-- "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with,."...--and the words thus express a broad pre-emptive purpose....Petitioner contends that § 1305(a)(1) only preempts the States from actually prescribing rates, routes or services. This simply reads the words "relating to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to "*regulate* rates, routes and services."

Id. at 2037-2038 (emphasis in original, citations omitted.) (*See also Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983).

[8] By way of contrast, in the statute at issue in *Fabe* there were no such references to insurance.

The legislative history of the McCarran-Ferguson Act likewise confirms that Congress intended a more liberally applied test for federal preemption in the insurance context than the one fabricated by the court below, by virtue of the deliberate choice of the word "relates" rather than "requires" or "regulates." Indeed, Congress specifically rejected proposed language in an earlier draft of the bill that became the McCarran-Ferguson Act that would, if enacted, have done what the court below says it did anyway. Both the House and Senate versions of the legislation provided that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business, unless such Act *specifically so provides.*" 91 CONG. REC. 488 (1945) (Senate) (emphasis added); *id.* 1085-94 (House). Had Congress enacted that language, a federal act would have to expressly *provide* that it invalidates, impairs, or supersedes state law in order to have preemptive effect. The conference committee, however, changed this language, and instead required that a federal law need only "*specifically relate to the business of insurance*" in order to "invalidate, impair or supersede" a state law. H.R. Rep. No. 213, 79th Cong., 1st Sess. 1 (1945) (conference report). Aside from turning the plain language of the actual enacted McCarran-Ferguson Act on its head, the court below did violence to the history of the law as well.

It is clear from application of recent precedent of this Court that Section 92 specifically relates to the business of insurance *agency*. Whether it specifically relates to the business of *insurance* is a question that requires an additional

analytical step, but we suggest that it is a merely academic one.

This Court has written, in dicta, that matters pertaining to "the licensing of [insurance] companies and their *agents* ... are also within the scope of [McCarran-Ferguson]." *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). If that is so, then obviously a federal statute that "relates" to the business of an insurance agent is one that likewise "relates" to the business of insurance, and is entitled to preemptive effect under the terms of the McCarran-Ferguson Act itself.

Conversely, as we develop more fully below, this Court's most precise definition of "the business of insurance," *Union Labor Life Insurance Company v. Pireno*, 458 U.S. 119 (1982), would not seem to leave much room within that definition for mere agents. Rather, it seems limited to activities in which the parties engage as principal. If that is so, then a state law that "regulates" the business of an insurance *agent* would not fit within the McCarran-Ferguson Act's "business of insurance" language at all, and normal rules of federal preemption would apply to this controversy.[9]

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[9] We suggest that the normal rules of federal preemption apply in this case in any event, and dictate that Section 92 supersedes the Florida anti-affiliation statutes at issue here. In *John Hancock*, *supra*, this Court held that there was

> no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but "*where [that] law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress," federal preemption occurs.* (Emphasis added.) ... [I]n the case of a direct conflict, federal supremacy principles require that state law yield.

Id. at 526 (citations omitted).

In either event, Section 92 preempts contrary state law.

II. THE FLORIDA ANTI-AFFILIATION STATUTE IS NOT A LAW ENACTED FOR THE PURPOSE OF REGULATING THE BUSINESS OF INSURANCE

In the preceding section of this brief, we demonstrated that Section 92 "specifically relates" to insurance, whatever definition is given to the statutory term,

It is all but self-evident that Congress had some goal in mind when it enacted the statute in 1916 providing that national banks *may* act as agent in the sale of insurance, and that whatever goal that was, it is thwarted entirely by a state law providing that national banks may *not* do so. As in *John Hancock*, a case of direct conflict is presented here, the state law stands as an obstacle to the objectives of Congress, and the state law must therefore yield. *See Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153-155 and 162 (1982).

"business of insurance." It is, therefore, entitled to preemptive effect under the explicit terms of the McCarran-Ferguson Act itself. Should the Court so hold, that determination would be dispositive of this case in and of itself. Doing so, however, would not resolve the conflicts among lower courts over how to apply the term "business of insurance" in the context of state anti-affiliation statutes. Those conflicts would continue and would require resolution by this Court in a future proceeding involving a national bank's power to offer "insurance" products as agent over the objection of a state is premised not on Section 92, but rather on some other source of authority such as 12 U.S.C. Section 24(Seventh), the "incidental powers" clause for national banks. *See NationsBank v. VALIC*, 115 S. Ct. 810 (1995). That continuing conflict would be resolved by this Court's determination that state anti-affiliation statutes are *not* "enacted for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act. That issue is properly before the Court, has been fully briefed, and is ripe for decision. We respectfully urge the Court to resolve it in this case.

The court below held that Section 626.988 of the Florida Statutes, as applied to the authority of national banks to engage in the insurance agency business in Florida, is a state law enacted for the purpose of regulating the business of insurance, and is therefore protected from preemption by Section 2(a) of McCarran-Ferguson. To the contrary, Section 626.988 of the Florida statutes is not such a law for at least three reasons: (a) It is a law designed for the purpose of excluding new and effective competitors from the preexisting insurance agency market in Florida; (b) It has

the effect of regulating the business of banks, bank holding companies, savings and loans, savings and loan holding companies and savings and loan service corporations, none of which is an entity within the insurance industry as required by this Court's controlling holding in *Pireno*, 458 U.S. at 129; and (c) The exclusion of anyone from the business of an insurance *agent*, whatever its intrinsic merits, is not the regulation of the business of insurance itself.

A. What the Legislature's Purpose Was

The intent of the state legislature in enacting the statute is a key element in determining whether it fits both within the McCarran-Ferguson Act's language and this Court's holding that statutes *aimed* at protecting the relationship between insurer and insured are statutes regulating the business of insurance.[10] A Florida appeals court has described the "intent" of the legislature in this case:

> Concerns regarding financial institutions entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today.

Glendale Federal Savings & Loan v. Department of Insurance, 587 So.2d 534, 536 (Fla. 1st DCA 1991), *rev. denied*, 599 So.2d 656 (Fla. 1992).

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[10] *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. at 460.

Not uncharacteristically, the above passage reflects--at best--a mixed motive on the part of the legislature. To the extent that there was a concern for "undue concentration of resources" in financial institutions, the "intent" of the legislature had no conceivable link to the regulation of the business of insurance. That had to have been the dominant intent of the legislature here, because the actual enacted laws deal with the other expressed concerns in an entirely irrational manner:

o Section 92 allows national banks in small towns to act as agent in the sale of any insurance. Sales need not be to existing customers at all. A national bank-affiliated insurance agent can sell insurance policies to noncustomers who have never set foot in the bank itself and have no intention of doing so. Certainly there could not rationally be any element of "coercion" or "unfair trade practices" unique to banking under such a scenario. Where "coercion" allegedly is a concern (if only in the minds of insurance agent trade associations and insurance commissioners) it would only be in the area of credit-related insurance where prospective bank borrowers allegedly may feel that the loan approval process may be affected by whether they buy credit insurance from the bank.[11] Still, the Florida legislature chose to *allow* banks to sell "credit life insurance and credit

[11] A General Accounting Office study in September 1990 found only anecdotal evidence of any coercion by banks in the sale of insurance. An overwhelming majority of surveyed customers who purchased credit insurance thought it was a good product and would purchase it again; even among those borrowers who did not purchase credit insurance, over half thought it was a good product. *Bank Powers: Issues Relating to Banks Selling Insurance* (GAO/GGD-90-113) at 21-22.

disability insurance"--the forms of insurance that would be most susceptible to tie-ins (but for federal law prohibiting such tie-ins, 12 U.S.C. § 1972)--while prohibiting, in part, the sale of insurance *not* susceptible at all to tie-ins, to noncustomers who could not be tied in to anything. Fla. Stat. ch. 626.988(1)(b).

o The Florida statute was enacted in 1974. If there was, at that time, a true "concern" over "coercion" or "unfair trade practices" by banks in the sale of insurance, one must assume that a reasonable response by the legislature would have been to prevent those entities that had engaged in such coercion or unfair trade practices from doing so in the future. The Florida legislature did exactly the opposite. It "grandfathered" the insurance agency activities of *all* the financial institutions then engaged in the business. The prohibition in the statutes runs *only* to those banks that had not been engaged in the business (and, therefore, could never possibly have coerced anyone). Fla. Stat. ch. 626.988(5).

o Notwithstanding the alleged concerns of the legislature about "coercion" and "unfair trade practices" that are said to justify the application of this state statute to a national bank located in a town of fewer than 5000 population (despite conflicting federal law), the fact is that the Florida law *specifically allows* banks in towns of fewer than 5000 population to act as the agent in the sale of insurance. Fla. Stat. ch. 626.988(1)(a). The only small-town banks excluded from the insurance business are those owned by holding companies. There is no evidence anywhere that the legislature thought holding company-owned banks were inherently "coercive," whereas

independent small town banks were not.[12]

The statute is entirely about preventing "concentration of resources" in effective competitors, the banks, for the protection of the market share now held by the independent agent constituents of the elected Insurance Commissioner. That has nothing to do with regulating the business of insurance. It has to do entirely with hamstringing the business opportunities of the banking industry granted by federal law.

We do not denigrate the policy choices made by the Florida legislature. A great deal of legislation, both at the state and the national level, deals with the regulation of

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[12] Florida is by no means alone in adopting anticompetitive legislation in this area under the cover of "consumer protection," and then actually acting in an inconsistent fashion with the announced "intent" of the legislation. In Kentucky, for example, the anti-affiliation statute actually permits the sale of insurance by a bank so long as no one entity owns more than half of the bank. Ky.Rev.Stat. § 287.030(4). *See Brief of Respondents* in *Stephens v. The Owensboro National Bank*, (U.S. No. 95-74, September 13, 1995) at 10-12. Similarly, Louisiana "grandfathers" banks that were engaged as general insurance agents on January 1, 1984, *see* La. R.S. 6:242(A)(6), and permits every other form of depository institution to act as agent in the sale of insurance. *See* La. R.S. 6:902(B); La. R.S. 6:644(B)(9). The Fifth Circuit has described the distinction between banks and others in this respect as "seemingly...irrational." *American Bank & Trust Co. of Opelousas v. Dent*, No. 93-5040 (5th Cir. 1994) Slip op. at 8.

competition and the prevention of undue concentration of economic or other power in too few hands. In the abstract, there is nothing wrong or irrational about such legislation. We merely point out that the federal legislature has made a conflicting choice, for good and valid public policy reasons of its own. Under the Supremacy Clause of the Constitution, it is the federal choice that must be honored, and the McCarran-Ferguson Act, correctly applied, does not change that result. It preserves from preemption only laws enacted for the purpose of regulating the business of insurance, not laws enacted for the purpose of regulating competition. On virtually identical facts, the Third Circuit has held, correctly in our view, that the Pennsylvania anti-affiliation statutes, purportedly enacted to regulate insurance, were in actuality designed "to prevent competition between insurers and Pennsylvania financial institutions." As such, the McCarran-Ferguson Act did not preserve those statutes. *United Services Automobile Association v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

B. What Business is Actually Regulated

The sale of insurance, as agent, by national banks located and doing business in small towns is a part of the business of banking. Virtually every court that has examined this issue has so concluded:

o "The 'business of insurance' has been narrowly defined, and it seems fairly obvious that § 92 does not constitute Congressional regulation of that business. That section is a part of the National Bank Act, and its function is to grant additional powers to national banks. That the power granted to national banks involves insurance does not transform this section into the regulation of the business of

insurance....Just as § 92 does not regulate the business of insurance, neither does Ky. Rev. Stat. 287.030(4) constitute insurance regulation....It relates to the powers of bank holding companies, not to the powers of insurance companies or agents." *Owensboro National Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992); *aff'd*, 44 F.3d 388 (6th Cir. 1994), *petition for cert. pending*, No. 95-74. (Cited with approval in *Barnett Bank of Marion County v. Gallagher*, 839 F. Supp. 835, 843 (M.D. Fla. 1993), *aff'd*, 43 F.3d 631 (11th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3238 (U.S. September 27, 1995)(No. 94-1837) and in *First Advantage Insurance v. Green*, 652 So. 2d at 573.

o "But § 92 in no way governs the manner in which the business of insurance is conducted; rather it merely helps to define the powers of national banks....Section 287 [Ky. Rev. Stat.]...helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute 'the business of insurance.'" *Owensboro National Bank v. Stephens*, *supra*, 44 F.3d at 391-392.

o "[B]ecause the debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they do not constitute the 'business of insurance' under the McCarran-Ferguson Act....[T]he McCarran-Ferguson Act was not directed at the activities of national banks." *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 779 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990).

o "[W]hen Congress enacted section 92 in 1916... Congress was concerned with banking, not insurance." *Barnett Bank of Marion County v. Gallagher*, 43 F.3d at 637.

o "[A]ffiliation between insurers and banks has no integral connection to the relationship between the insured and insurer; and banks are not entities within the insurance industry. Regulations such as section 641 [of the Pennsylvania Insurance Act, forbidding the licensing as an insurer of any affiliate of a lending institution] have no part in the business of insurance under McCarran-Ferguson." *USAA v. Muir*, 792 F.2d at 364.

But if that is so, then self-evidently the effort of a state to dictate whether, when, how, or to what extent, a national bank may engage in the activity is an effort to regulate the business of banking, pure and simple. As above, there is nothing wrong, in the abstract, with a state's regulation of the banking business. But where the United States makes a different policy choice with respect to the regulation of that business than does a state, it is the federal choice that must be honored under the Supremacy Clause. The only exception to that general rule that is even arguably meaningful here is set forth in the McCarran-Ferguson Act. That law saves from preemption only those state laws that are designed to regulate the business of insurance, not state laws that regulate--as here--the business of banking.

C. REGULATION OF AGENTS VS. REGULATION OF PRINCIPALS

This Court has, several times, had occasion to describe what constitutes the "business of insurance" for purposes of the McCarran-Ferguson Act.

In *SEC v. National Securities, Inc.*, 393 U.S. at 460, this Court held that the

> relationship between *insurer* and insured, the

> type of policy which could be issued, its reliability, interpretation and enforcement--these were the core of the "business of insurance"...Undoubtedly, other activities of insurance *companies* relate so closely to their status as reliable *insurers* that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance *company* and the policyholder.

Accord, U.S. Department of the Treasury v. Fabe, 113 S. Ct. 2202, 2212 (1993).

In *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982), the Court elaborated on the above definition by setting forth a three-part test of what constitutes the business of insurance for McCarran-Ferguson Act purposes:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the *insurer* and the insured; and third, whether the practice is limited to entities within the insurance industry.

Barnett Bank of Marion County is not an insurance company or an insurer; its subsidiary, Linda Clifford Insurance, Inc., is not an insurance company or an insurer; no national bank in a small town could--under current federal law--ever be an insurance company or insurer. Insurance companies are those that underwrite policies, collect

premiums and assume risks, *State ex rel. Reece v. Stout*, 65 S.W.2d 827, 829 (Tenn. App. 1933), not those companies that merely sell the products of insurance companies for fees and commissions. *See, e.g., Branson v. Prins Ins. Inc.*, 79 F.R.D. 662, 665 (D.S.D. 1978); *State ex rel. Meade v. Marion Superior Court*, 174 N.E.2d 408, 411 (Ind. 1961).

Fla. Stat. ch 626.988 can not be considered a statute "aimed at protecting the relationship between insurer and insured." It explicitly does *not* regulate any such relationship. It regulates (by prohibiting[13]) a relationship between a policyholder and an insurance agent, the bank's affiliate; it regulates (by prohibiting) a relationship between an insurance company and an insurance agent, the bank's affiliate.

An insurance *agent* is not a party to the relationship between an insurance *company* and a policyholder. The agent merely serves to bring those two parties together, much as a real estate agent or a securities broker bring buyers and sellers together without becoming a principal in the transaction. Indeed, all of the tests set forth by this Court for determining what is the "business of insurance" run necessarily to "insurers" or "insurance companies" only. Under those tests, the insurance *agency* business is separate and distinct from the insurance business. The McCarran-Ferguson Act pertains only to the latter.

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[13] The McCarran-Ferguson Act uses the word "regulate," but "regulate" does not mean "prohibit." *Black's Law Dictionary* (6th ed. 1990) at 1212 defines "prohibit" as "forbid by law; to prevent; - not synonymous with 'regulate.'" *See also Owensboro National Bank v. Stephens*, 44 F.3d at 392.

A state's efforts to regulate the business of an insurance *agent*, therefore, are entirely legitimate, clearly within the police powers of the state, supported by valid public policy considerations, and in all respects fitting and proper exercises of sovereign authority. But, like any other such state efforts, other than the regulation of "the business of insurance," state regulation of insurance agents is subject to preemption by conflicting federal law under traditional analyses of the Supremacy Clause.

III. STATES MAY NOT IMPOSE UNIQUE RESTRICTIONS ON NATIONAL BANK AFFILIATED INSURANCE AGENCIES

In the interests of judicial economy as well, we respectfully urge the Court, in the course of its decision in this matter, to enunciate clearly the principles by which state interference with national bank insurance agency activities can be judged. Assuming, for purposes of argument, that Section 92 is held to preempt contrary state laws for the reasons outlined above, it is still critical to go the extra step, so as to avoid an entirely unnecessary "next generation" of litigation over state control of the exercise of insurance agency powers by national banks.

Several of the state insurance commissioners around the country are exceptionally hostile to the involvement of banks in the insurance agency business. They will seize upon the smallest opening left available to them in any less-than-comprehensive court decision in order to deny in fact that which courts have held banks are entitled to in law.

o In Indiana, for example, even though no state law imposed (or was alleged to impose) any limits on national bank insurance agency activities, the Commissioner

nevertheless, on her own initiative, insisted on limiting the market for such activities to residents of small towns. Litigation was required in order for the bank to establish its right to a broader market. *NBD Bank, N.A., v. Bennett*, ___ F.3d ___.

o Even though this Court, this year, by unanimous vote, has held that sale of annuities does not constitute the sale of insurance, and that the sale of annuities is within the incidental powers of national banks,[14] the Commissioner in Mississippi has refused to license a national bank to sell annuities. Litigation has resulted from that action as well. *Deposit Guaranty National Bank v. Dale*, Civil No. 95 CV 640 WS (S.D. Miss.).

o After this Court's *VALIC* decision earlier this year, the State legislature in Louisiana, specifically authorized state banks to sell annuities "to the same extent as federally chartered banks," and mandated the Insurance Commissioner to license banks to do so. La. R.S. 6:242(A)(16), La. R.S. 22:1113(6).[15] Yet to this day, the Commissioner routinely advises applicant banks that no such licenses can be granted to them pending issuance of a "directive" by the Insurance Department. The "directive" will apply only to bank-related agents, and will stand apart from normal licensing qualifications.

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[14] *NationsBank v. VALIC*, 115 S. Ct. 810.

[15] Louisiana state law also provides for parity between state and national banks, conferring upon the state banking commissioner the power to grant state banks, by administrative rule, powers held by national banks. La. R.S. 6:242(C).

o In Kentucky, the U.S. District Court ruled in favor of national banks on the very issues that are before the Court in this case; the Commissioner was directed to entertain insurance license applications from the plaintiff banks; no stay of the court's order was ever entered, and yet the Commissioner refused to do as ordered until contempt proceedings were initiated. *Owensboro National Bank v. Moore*, 803 F. Supp. 24.

o In Ohio, the state Supreme Court, three years ago, plainly held that state statutes permitted the licensing of insurance agents affiliated with banks. *Independent Insurance Agents of Ohio v. Fabe*, 63 Ohio St. 3d 310, 587 N.E.2d 814 (1992). To this day, the Insurance Commissioner has refused to abide by that decision. Most recently, the state Supreme Court has been required to issue a writ of mandamus to him. *State ex rel. Huntington Insurance Agency v. Duryee*, 73 Ohio St. 3d 530, 653 N.E.2d 349 (1995).

o In Florida, the initial reaction to this Court's *VALIC* decision was a proposed set of rules and regulations that would govern bank sales of annuities and that would be far more onerous than the rules applicable to other sellers of annuities in that state.[16] Indeed, in the very case now before this Court, the Commissioner made an argument (that the lower courts did not reach) to the effect that a bank's Section 92 powers were limited to the residents of the small town in which the bank is located. That is an argument that will re-appear in this case in the absence of clear direction from this Court.

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[16] Florida Department of Banking & Finance, Rule 3C-100.960, Florida Administrative Code (August 24, 1995).

In short, it is obvious that insurance commissioners in many instances have used their licensing powers to deprive national banks of their federally granted authority. State efforts that frustrate, burden or impede the federal purpose are null and void. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 406, (1819). The commissioners' actions outlined above, to the extent at least that they treat national banks less favorably than other insurance agents licensed by the respective states, clearly do frustrate, burden and impede the federal purpose. The Commissioners need to be told that, explicitly, here and now. It serves no useful purpose for the Commissioners to be granted such a right. As indicated above, alleged concerns over "consumer protection" are already dealt with more than adequately at the federal level. In Section 92 itself, the Comptroller of the Currency is granted explicit rulemaking power over national bank insurance agency activities, and the Comptroller has, for at least some purposes, already adopted detailed regulations. *See Interagency Statement on Retail Sales of Nondeposit Investment Products*, February 15, 1994 (Reproduced at OCC NR 94-21, 2-17-94).

CONCLUSION

This case is not about an industry's effort to escape legitimate regulation. It is a case about an industry's effort to exercise a power that is specifically and explicitly made available to it by long-standing federal statutory law--a law that explicitly and specifically subjects the exercise of the granted powers to the regulation of a federal official, to the exclusion of other potential regulators. It is a case about a competitor industry's effort to preserve and protect its position in the marketplace through artificial restraints. In the absence of strong legal justifications for preventing competition, that is a matter that ought to be decided by the

free market instead. For the reasons indicated throughout this brief, amici respectfully suggest that there is no legal justification for depriving banks and the public of the benefits of competition. The Eleventh Circuit decision to the contrary should be reversed.

Respectfully submitted,

John J. Gill III
Counsel of Record
Michael F. Crotty
Mathew H. Street

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

Attorneys for Amici Curiae

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